APPENDIX B

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MAY 27 1965

Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This replies to your May 10 request for elaboration on our statement that "although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal (income) tax case of such right (to counsel)."

Numerous cases support the proposition that there is no duty resting upon an investigating special agent to warn a taxpayer that he does not have to testify against himself or to give any information that might be used against him, and the relevant inquiry is limited to whether the information has been understandingly and willingly given. United States v. Frank, 245 F.2d 284 (3rd Cir. 1957) cert. den. 355 U.S. 819; Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); Turner v. United States, 222 F.2d 926 (4th Cir. 1955) cert. den. 350 U.S. 831; Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959) cert. den. 360 U.S. 918.

The latest decision so holding is United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), cert. den. ___ U.S. ___ (1965). This case is of particular importance in that the court rejected the defendant's argument that information, even though voluntarily given, could not be introduced into evidence against him because he had no knowledge of his constitutional right to refuse to furnish such information. Defendant contended that the mere lack of knowledge of his constitutional rights was enough to vitiate the voluntary surrender of his records. In denying such assertion the court indicated that to hold otherwise would bind the Government by defendant's subjective state of mind which is not subject to proof, and would stand for the untenable proposition that one who has no duty to advise a taxpayer of his constitutional rights may nevertheless be held responsible for taxpayer's ignorance of such rights. This case was decided six months after the Escobedo decision. The Seventh Circuit apparently did not consider that the factual setting before it fell within the purview of Escobedo.

The Spomar holding is that Escobedo does not require a special agent to voluntarily advise a taxpayer of his Fifth Amendment right against self-incrimination. The Spomar rationale would similarly support the proposition that, despite the Supreme Court's holding in Escobedo that a Sixth Amendment "right to counsel" exists under certain circumstances during an investigation, an agent is under no duty to voluntarily advise a taxpayer of it.

Irrespective of this interpretation of Spomar, it is the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division at the conclusion of the investigation. Similarly, he is orally advised of such right when meeting with representatives of Regional Counsel's office. This practice is, of course, predicated solely upon a recognition of the administrative desirability to apprise an individual of his right to counsel as contrasted with any legal requirement to do so. Obviously, under certain circumstances (e.g., where the taxpayer is known to have retained counsel or is himself an attorney) explicit advice of right to counsel may be inappropriate.

Regarding your proposed Law Review comment, we have no objection to your quoting from, or referring to, correspondence received from this office.

It is hoped that the foregoing will be of assistance.

Very truly yours,

MITCHELL ROGOVIN
Chief Counsel